No. 10639.

IN THE

16

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALEXANDER CHASKIN, doing business as Chaskin Citrus Co.,

Appellant,

vs.

HOWARD W. THOMPSON,

Appellee.

BRIEF OF APPELLEE.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

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Jurisdiction.

The decree of injunction of the District Court in the above case here on appeal was entered on the 1st day of November, 1943. The jurisdiction of this court rests upon Section 128 of the Judicial Code. 28 U. S. C. A. (1940 Ed.) 225.

Proceedings in the Court Below.

The appellee adopts appellant's statement of proceedings in the court below.

Statement of Facts.

So far as this appeal is concerned, the proceedings in the court below are adopted as a statement of facts.

Question Presented.

Whether a complaint which alleges that defendant, by fraudulently and maliciously stating and representing to packers and brokers of citrus fruit, had as an employee of the United States Department of Agriculture, the lawful power and authority to do or have done certain things which would adversely affect such packers and brokers, sets forth a case that arises under the Constitution or laws of the United States within the federal removal statute.

ARGUMENT.

I.

The Right to Transfer From a State Court to a Federal Court Is Present, if the Plaintiff's Right or Immunity Will Be Supported by One Construction of the Constitution or Laws of the United States and Defeated by Another Construction.

The Government takes no issue with appellant's contention that to bring a case within the removal statute, the right or immunity decreed by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. But it is the contention of the Government that if the complaint shows upon its face that a construction of the law of the United States is invoked which will, if given one construction, allow the plaintiff to prevail, but if given another will defeat the plaintiff, then such a case comes within the removal statute.

King County, Washington, v. Seattle School District No. 1, 263 U. S. 361, 68 L. Ed. 339;

First National Bank v. Williams, 252 U. S. 504, 64 L. Ed. 690;

Gully v. First National Bank, 299 U. S. 109, 81 L. Ed. 70.

While it may be true that the defendant herein is not sued in his official capacity so far as the specific words of the complaint are concerned, nevertheless it is obvious without argument that the action set forth in the complaint is one against the defendant under color of his official position because only by such color of title, at least, could the alleged false and fraudulent statements of the defendant have had any effect, and without such an allegation as to defendant's official position, it is doubtful that the complaint could set forth a cause of action over which even the state court would take jurisdiction.

II.

Plaintiff's Right Depends Upon a Construction of the Agricultural Adjustment Act, and the Regulations Duly Promulgated Pursuant to That Act, as Plaintiff's Cause of Action Against the Defendant Depends Wholly Upon What, if Any, Authority Defendant Had as an Official of the Department of Agriculture.

This court will take judicial notice of the laws of Congress attempting to regulate the marketing of citrus fruits in interstate commerce. This court will likewise take judicial notice of the fact that these laws are administered by employees of the Department of Agriculture.

It seems to follow, without argument, that a complaint which alleges that an individual representing himself to packers and brokers of citrus fruits as an employee of the United States Department of Agriculture, has certain lawful powers and authority to do or cause to be done certain things which would adversely affect them—then said cause of action is predicated upon the question of whether or not such a person is an employee of the Department of Agri-

culture—and, therefore, even if the allegations concerning his actions are true, or if such actions are outside the scope of defendant's authority as such employee, it is obvious that no laws, other than those which we denominate laws of the United States, can determine the question.

In the case of *Downey v. Geary-Wright Tobacco Company* (E. D., Ky., 1941), 39 F. Supp. 33, a tobacco grower, who had been delivering tobacco to a warehouse, brought an action on behalf of himself and all those other tobacco growers similarly situated in the state court against the warehouse for an accounting and declaratory judgment. The cause was removed from the state court to the United States District Court. Upon motion to remand, the District Judge denying the motion and overruling plaintiff's contention that his petition disclosed nothing more than a common law cause of action for money had and received and, therefore, the case should be remanded upon authority of *Louisville & National Railroad Company v. Mottley*, 211 U. S. 149, 53 L. Ed. 126; *Tennessee v. Union & Planters Bank*, 152 U. S. 454, 38 L. Ed. 511, said:

> "The prayer of the petition is that 'an accounting be had with the defendant to ascertain the amount due to him on all tobacco sold on said date, the deductions made and the purpose for which the defendant intends to apply same, and that all sums of money withheld from the plaintiff and those persons for whom he sues be paid to said receiver to be held by him until the rights of this plaintiff and all patrons and tobacco growers can be ascertained. He prays judgment of this court that it be decreed that the defendant was without right to withhold any sums of money from the purchase price of his tobacco, and that it is the duty of the defendant to pay to him the said $380.60 and interest thereon. He prays that this suit

be permitted to be prosecuted for the benefit of the plaintiff and all other persons similarly situated.'

"The Court has judicial knowledge of the fact that 'the marketing of tobacco constitutes one of the great basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce,' that the Congress of the United States has so declared by the Agricultural Adjustment Act of 1938, Sec. 311 of the Act, 7 U. S. C. A. §1311, and in order 'to promote, foster and maintain an orderly flow of this basic commodity in interstate and foreign commerce,' has 'found it necessary and appropriate' to regulate and control the marketing of it by authorizing the establishment of marketing quotas and prescribing penalties for the marketing thereof in excess of established quotas, by fixing and defining the rights and duties of producers, warehousemen and other persons engaging or participating in the marketing industry and by conferring upon the Secretary of Agriculture the authority to prescribe such rules and regulations as might be or become necessary for the enforcement of the Act. The Court must take judicial notice not only of the provisions of the Act itself but of all rules and regulations made and promulgated under its authority, for, 'wherever, by the express language of any act of congress, power is intrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice.' Caha v. United States, 152 U. S. 211, 222, 14 S. Ct. 513, 517, 38 L. Ed. 415.

* * * * * * * *

"The foregoing summary of the averments of the petition and the relief sought seems sufficient to show that the cause of action asserted extends beyond a mere common law action of assumpsit. The plaintiff invokes the jurisdiction of the Court on behalf of himself and all other persons similarly situated to secure a judgment declaring the rights and duties of the parties in respect to a transaction which so directly affects interstate commerce that, in the exercise of its constitutional powers, the Congress has seen fit to regulate it and to prescribe the rights and duties of parties participating in it. Agricultural Adjustment Act of 1938, 52 Stat. 45-48, 49, 7 U. S. C. A. §§1311-1322. The plaintiff thus makes the determination and declaration of the law of the United States governing the rights and duties of the parties an essential element of his case. He presents a claim and discloses a controversy of such a nature that it can only be correctly determined by a declaration of the law under and in the light of the Act of Congress and the regulations made pursuant thereto. This is disclosed upon the face of the complaint without anticipating defenses and unaided by the petition for removal. This differentiates the instant case from the cases upon which plaintiff relies.

"Obviously in rendering any judgment predicated upon the facts set out in the petition and in response to its prayer for a declaration of the rights and duties of the parties in respect to the transaction described, the federal question could not be avoided even if no answer were filed and no defense of any character made.

"As the Court takes judicial notice of the federal law involved, the omission of specific reference thereto in the pleading is immaterial. Southern Pacific Co. v. Stewart, 245 U. S. 359, 362, 38 S. Ct. 130, 62 L.

Ed. 345; Hartford Fire Ins. Co. v. Kansas City, M. & O. Ry. Co., D. C., 251 F. 332. Neither is it material that the case may be ultimately decided upon some other issue. 'It should be borne in mind in this connection that jurisdiction depended upon the allegations of the bill, and not upon the facts as they subsequently turned out to be.' City R. Co. v. Citizens' Ry. Co., 166 U. S. 557, 562, 17 S. Ct. 653, 655, 41 L. Ed. 1114.

"That the plaintiff does not rely upon 'any law regulating commerce' does not leave the suit beyond the reach of federal jurisdiction under Section 24(8) of the Jud. Code, 28 U. S. C. A. §41(8), if, as a matter of law, his case must stand or fall or its correct determination depend upon the effect or validity of applicable Congressional legislation enacted under the 'commerce clause' of the Constitution, art. I, §8, cl. 3. Turner, Dennis & Lowry Lumber Co. v. Chicago, M. & S. P. Ry. Co., 271 U. S. 259, 46 S. Ct. 530, 70 L. Ed. 934; Mulford v. Smith, 307 U. S. 38, 59 S. Ct. 648, 83 L. Ed. 1092.

"Looking to the nature of the plaintiff's case, confined to an orderly statement of facts essential to show him entitled to a declaratory judgment of the nature which he seeks, I am of the opinion that the suit is within the statutes conferring original jurisdiction upon the district courts of the United States and authorizing removal thereto, upon the ground that it is a suit arising under a law of the United States regulating commerce. See Blease *et al.* v. Safety Transit Co., 4 Cir., 50 F. 2d 852; Young & Jones v. Hiawatha Gin & Mfg. Co., D. C., 17 F. 2d 193, and the authorities cited therein.

"The plaintiff's motion to remand should be overruled."

While it is true that the above case is only a District Court case, nevertheless, we believe that it is a correct exposition of the law; and that the cases cited by Judge Ford—such as *Southern Pacific Company v. Stewart,* 245 U. S. 359, 62 L. Ed. 345, and *Caha v. United States,* 152 U. S. 211, 38 L. Ed. 415—amply sustain the District Court's decision, and more than amply sustain the contention of the Government in the instant case.

Not only will the court take judicial notice of the laws of Congress attempting to regulate the marketing of citrus fruits in interstate commerce, and that these laws are administered by employees of the Department of Agriculture, but it will also take judicial notice, having the power to do so, of the defendant's official capacity and even the extent of his authority and the scope of his duty. *Cooper v. O'Connor,* 99 F. (2d) 135, and cases cited therein; footnote, page 137.

Analysis of Plaintiff's Cases.

The appellant has cited numerous cases under his Point I, to which the Government takes no exception whatsoever. None of these cases hold the phraseology such as used in plaintiff's complaint fails to show on the face of the complaint that the case is one arising under the Constitution and laws of the United States. Rather, they are straight actions for damages against an individual without any reference to his official position; or else, they are cases in which the official position has been set out for the first time in the defendant's answer, such as in the case of *Walker v. Collins,* 167 U. S. 57, and the authority for that case, *Chappell v. Waterworth,* 155 U. S. 102.

We believe, therefore, that where, as in the present case and in the *Downey v. Geary-Wright Tobacco Company* case, *supra,* the court can take judicial notice that a law of the United States is involved merely by reading the plaintiff's complaint that the case is one, as held by Judge Ford, arising under the Constitution or laws of the United States.

Conclusion.

Wherefore, it is respectfully submitted that this appeal be dismissed and that the decree of injunction of the United States District Court herein be in all respects affirmed.

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